WILLIAM F. GARY
Admitted in Oregon and California
360 East 10th Avenue, Suite 300
Eugene, OR 97401-3273
william.f.gary@harrang.com

DAVE FROHNMAYER
Admitted in Oregon
360 East 10th Avenue, Suite 300
Eugene, OR 97401-3273
dave.frohnmayer@harrang.com

541.485.0220
541.686.6564 (fax)

February 19, 2014

Re: HB 4143-A - Legal Analysis

We are writing in response to letters sent February 17, 2014 by Legislative Counsel Dexter Johnson and Attorney General Ellen Rosenblum regarding HB 4143-A. As we describe below, those letters reflect a significant misunderstanding of both existing class action law and the changes HB 4143-A would implement.

The letters begin with and are founded on the claim that HB 4143-A merely "authorizes the judge in a class action to approve a process for payment of damages" that are left over after all claimants are paid – in other words, "residual" damages – and that doing so would bring Oregon into line with the overwhelming majority of other states. That claim is the cornerstone of Mr. Johnson's and Attorney General Rosenblum's constitutional assessment of the bill, and it is the basis for the proponents' support of it. **If that claim were true, we would not be opposing HB 4143-A today. But that claim is not true.** HB 4143-A does not merely implement "a process for *payment of damages*" that are residual. The bill fundamentally changes the procedural rules by which class actions are governed – and in particular, entirely disposes of the well-established structure of rules by which damages in class actions are determined in the first place. And it does so in ways that are both drastic and constitutionally unsound.

To understand why that is true, it is necessary to step back and take a brief look at how damages are determined in class actions under existing Oregon law. Under existing law, class actions fall into one of two categories, referred to here as "opt-in" and "opt-out" actions. In an "opt-in" class action, the court requires all potential class members to submit a claim form requesting affirmative relief and, where appropriate, to give the court information concerning the nature of the claimant's loss or injury, the claim itself, the transactional relationship at issue, or the damage claimed. ORCP 32 F(2)(i). That way, the

court has all the information it needs to determine the appropriate amount in damages to award against the defendant, to whom it should be paid, and in what amount. Those who "opt in" thereby become part of the class, and their claims are added together to determine the damages assessed against the defendant.

Those who do *not* "opt in" using that claims process are not included in the class, and their claims are not included in the damages assessed against the defendant. ORCP 32 F(3). By rule, those individuals' claims are dismissed from the class action, and those individuals retain the right later to sue the defendant on their own. *Id.*

The second kind of cases, in contrast, are simpler cases in which the specific identities of class members "can reasonably be determined from the defendant's business records" and individual claimants' monetary recoveries "are capable of calculation without the need for individualized adjudications" -- leaving no need for a claims process. ORCP 32 F(2)(iii). In those cases, the rules allow the court to take evidence that (for example) a defendant bank overcharged every one of its 20,000 members by wrongfully imposing a $50 fee – and to determine based on that evidence how much in damages to award (one million dollars) and to whom it must be paid (the bank's 20,000 members). In those cases, no "opt-in" claims process is necessary.

But because the law must still provide for every claimant's constitutional right to pursue his or her claim individually, the rules require that the court notify all such potential class members of their right to "opt *out*" of the class. As above, the claims of those who "opt out" are not included in the class, and their claims are not included in the total damages assessed against the defendant. ORCP 32 F(3). By rule, those individuals' claims are dismissed from the class action, and those individuals retain the right to later sue the defendant on their own. *Id.*

Finally, when damages are awarded, two final overarching requirements apply regardless of whether the action is an "opt in" or an "opt out" case: First, the total amount of damages assessed against defendant "shall not exceed the total amount of damages determined to be allowable" by the court under one of those two methods. ORCP 32 F(2)(iv). And second, whenever possible, the judgment must identify by name each member of the class and the amount each member is due individually. ORCP 32 L. That is how damages and class membership are – and have been for several decades – determined in class actions in Oregon.

The fundamental problem with HB 4143-A is that it does away with those processes entirely. The bill deletes every one of the above provisions, leaving in their place

nothing more than the court's unbounded discretion. Thus, as amended by HB 4143-A, Rule 32 will provide courts no framework of rules that can be applied consistently from case to case concerning whether claimants must affirmatively join ("opt in") or affirmatively abstain ("opt out") from the class, or what will happen if they fail to do so; concerning who is actually part of the class and who is not; concerning when a claims process is required and when one is not; concerning how to calculate the amount of damages to assess or whose claims those damages should include; and concerning who is bound by the judgment and who may instead pursue their own claims individually. What has been for several decades a well-established and clear set of procedural rules governing damages in class actions will now be a wide open field of guesswork, conflict, and inconsistency.

It is against that turbulent and uncertain backdrop that HB 4143-A would implement a *cy pres* doctrine providing that residual damages -- any part of the "amount awarded as damages" that is not paid to claimants -- may be directed to certain public organizations. Worse still, the bill does so *retroactively*, unfairly upending the settled expectations of litigants who have been litigating their cases for years, all in reliance on the procedural rules that Oregon has followed for decades. Parties have made settlement decisions, determined strategy, and planned their litigation choices based on the simple and reasonable notion that, as to their case, Oregon's rules are what they are. *See Landgraf v. USI Film Products*, 511 US 244, 266-268 (1994) (statutory retroactivity "has long been disfavored" and is constitutionally problematic because "[e]lementary considerations of fairness dictate that individuals should have an opportunity to know what the law is and to conform their conduct accordingly").

Thus, the underlying problem is not that a *cy pres* rule is itself unconstitutional or even unusual. It is neither. Rather, the problem is that the way HB 4143 carries out the *cy pres* concept – retroactively, and only after deleting the essential parts of ORCP 32 that allow damages to be properly ascertained and assessed in the first place – has severe constitutional consequences. We detailed several of those constitutional consequences in brief analyses submitted to the legislature on February 14, then expanded on those analyses in an opinion letter on February 17.

Legislative Counsel Johnson's and Attorney General Rosenblum's letters do not discuss the majority of those problems. And where the letters *do* address those problems, they do so inaccurately, on the basis of incorrect assumptions and incomplete understandings of the law.

For instance, while Legislative Counsel's letter acknowledges that "the bill does delete some provisions" concerning the process of determining damages awards – the very provisions

described above, which are in place because state and federal constitutional guarantees require them – the bill is *not* unconstitutional because judges in exercising their discretion "still have to meet all constitutional requirements and provide adequate due process to all parties." That statement overlooks a basic tenet of constitutional law: What the procedural requirements of the constitution (and the due process clause in particular) demand is not merely that legislatures avoid enacting laws that tell judges to act unlawfully. What the constitution requires is that states *affirmatively protect* citizens' rights by putting into place legal procedures that guard against their violation. *See, e.g., Philip Morris USA v. Williams*, 549 U.S. 346 (2007) ("Although the States have some flexibility to determine what kind of procedures they will implement, federal constitutional law *obligates them to provide some form of protection*" against due process violations). That is why ORCP 32 F contains the procedural protections that it contains. And that is why deleting them is so severely problematic.

Legislative Counsel's letter further contends that deleting the provisions of ORCP 32 F(2) is constitutionally permissible because "under current law (ORCP 32 F(2)(v)), the parties and the court could decide to use an alternate method for assessing damages." But that is no answer at all, because ORCP 32 F(2)(v) is merely a provision that allows parties to agree to *subject themselves* to different procedures than the rule provides. Under HB 4143-A, the rule would allow the court to subject parties, against their objections, to procedures different than those that protect their constitutional rights.

Moreover, it is false to suggest that the parties' right to subject themselves to different procedures indicates that the state needs not provide those procedures in the first place. By precisely the same principle, although Oregon is constitutionally required to provide indigent criminal defendants with an adequate public defense attorney, a defendant can decide on his or her own to instead proceed without one. The fact that the defendant can proceed without an attorney does not mean the state can constitutionally do away with the public defense program. The same result obtains here: the fact that parties can agree voluntarily to submit to different procedures than those provided for in the rule does not mean the state needs not provide constitutionally sufficient procedures in the first place.

Legislative Counsel's letter goes on to contend that it is permissible to delete the provisions of ORCP 32F(2) that carry out the state's *procedural* due process obligations – namely, to provide litigants "notice and opportunity" to be heard – because there still remain other provisions that "*give the court authority*" to do so, such that "the court is *able and encouraged* to provide adequate notice and opportunity for class members".

Again, that is no answer to the problem. There is no question whether the court is *able* or *has the authority* or is even *encouraged* to provide constitutional protections -- the court always has that authority, regardless of the state of the rules. The question is whether the rules *require* the court to provide such protections. Under current law, they do. Under HR 4143-A, they do not, and that is the problem. To borrow another analogy from criminal law, it is not enough to say law enforcement officers "are encouraged" to give a suspect his or her Miranda rights.

Next, Legislative Counsel's letter notes the problem of preclusion, but it does so without actually responding to the problem itself. As set out more briefly above, the problem inherent in HB 4143 is that it deletes longstanding provisions that govern which claimants' claims are dismissed in an "opt-in" and "opt out" actions and under what circumstances; provisions that govern which claimants expressly retain the right to re-file individually; and provisions that require judgments to, whenever possible, *specifically identify* all individual claimants such that they cannot assert duplicative claims later on. In contrast, under HB 4143-A, those requirements are gone. The rules would no longer say whether or how a court is to determine who is part of the class through any "opt in" or "opt out" process. And under the rule as amended, the court would be told merely to "generally describe" the class in the judgment, not specifically identify its members. As a result, precisely *whose claims* are part of the damages assessed – and therefore which claimants are bound by the judgment and thereby precluded from bringing their own claim individually – could now be entirely uncertain.

Legislative Counsel's letter provides no answer to that problem. The letter simply remarks that, "[a]s is the case under current law, a judgment in a class action under HB 4143-A would have to identify the class that is bound by the judgment." Thus, "[m]embers of the class who are covered by the judgment would be precluded from bringing individual claims, while persons who are not members of the class would be able to bring individual claims." That response sidesteps the fact that, under HB 4143-A, it could be impossible to determine *who is covered by the judgment in the first place*.

So, too, with the problem of statutory retroactivity: Legislative Counsel's letter offers no comment on why such retroactive legislation is consistent with existing parties' rights. The legislature and the counsel on which it relies must do more than that. Those changes *are* part of HB 4143. They must be carefully considered, not ignored.

Attorney General Rosenblum's letter is similarly lacking. General Rosenblum correctly notes that it is "imperative that members are clear on what the bill does and does not do," but then she does not mention the overwhelming majority of HB 4143 that consists purely of

deletions of well-established and constitutionally crucial provisions of civil procedure. Instead, she contends that the bill does no more than "allow the unpaid damages [in a class action] to be placed in an endowment fund as principal and the interest generated to be distributed to Oregon's legal aid organizations on a quarterly basis." Without a word of further analysis, Ms. Rosenblum's comment announces that "HB 4143 is fully compliant with the Federal and Oregon constitutions [and] neither creates a taking nor a Due Process violation." Of course, determining that a bill does not violate constitutional protections requires more than simply saying so.

Ultimately, the question is not whether it is a good idea to implement a *cy pres* rule in Oregon. The question is whether we ought to do away with the well-established procedural protections that ensure the damages assessed against a defendant have been properly calculated and adjudicated in the first place – all while bypassing traditional and careful consideration by the Council on Court Procedures of the consequences those changes create. And the answer to that question should be a resounding no.

Yours very truly,

William F. Gary

Dave Frohnmayer

Submitted on Behalf of BP America, Inc.
WFG/DF:vrs

HB 4143 AND THE "CY PRES" RULE: THE FACTS

- **Contrary to the proponents' claim,** we found only 15 states (not 40 or 48) that have *cy pres* provisions in their class action rules: California, Hawaii, Illinois, Indian, Kentucky, Maine, Massachusetts, New Jersey, New Mexico, North Carolina, North Dakota, Pennsylvania, South Dakota, Tennessee, and Washington.

- **None** of those states' *cy pres* rules allow a judge to dispense with the claims process and direct the defendant to pay money to the state instead, as Oregon's does. Rather, all states include a required process for identifying class members and their damages.

- **All** of those states' rules apply only if there are unclaimed funds after a judgment or settlement. HB 4143 does not.

- **Two** of the states' *cy pres* rules apply only to settlements: Maine and South Dakota.

- **Most states** specifically define the "residual funds" to which a *cy pres* principle applies as those amounts that remain **after payment of class member claims, expenses, costs, fees, and other court-approved disbursements**. HB 4143 contains no such provision.

Respectfully submitted by:

Harrang Long Gary Rudnick P.C.
William F. Gary

HB 4143-A: THE OVERVIEW

- ***HB 4143-A does not merely concern distribution of "residual damages." Rather, it repeals the well-established and decades-old procedural rules concerning how courts determine class membership and class member damages.*** Oregon does not need to amend or delete the procedures in ORCP 32 F—which work well as written—in order to implement a *cy pres* rule.

- ***The procedural rules that HB 4143-A deletes from ORCP 32 are part of the Rules of Civil Procedure because the federal due process clause requires that the state provide procedural rules by which such matters are decided that are consistent from case to case and from court to court.*** Thus, the deletions in this bill are not merely "housecleaning" deletions that remove extraneous material.

- ***The bill does not replace that constitutionally essential framework with another one.*** It simply deletes the provisions and leaves the procedure for determining class membership and damages to the discretion of the judge. For the reasons described above, that is not merely procedurally inadvisable; it is in fact constitutionally inadequate.

- ***In the absence of any such constitutionally essential framework, attempting to implement a cy pres rule is practically impossible and constitutionally unsound.*** A court cannot determine what "remainder" there is from a damages award without first determining class membership and damages. Making those determinations requires the consistent set of procedural rules that are currently contained in ORCP 32 F and that HB 4142-A deletes.

- ***Accordingly, every other state that has implemented a cy pres rule also retains a procedural framework by which those essential matters are consistently decided.*** Oregon would be the only state in the country to implement a *cy pres* statute without that underlying procedural framework.

- ***The retroactive application of HB 4143-A magnifies these problems and is fundamentally unfair.*** HB 4142-A would apply to any class action that has not been reduced to judgment—including cases that have been tried to verdict but have not yet been reduced to judgment. Changing the rules in the middle (or at the end) of the game would be fundamentally unfair to litigants, upending their settled expectations and reversing court rulings.

Respectfully submitted by:

Harrang Long Gary Rudnick P.C. on behalf of BP America, Inc.
William F. Gary
Dave Frohnmayer